Chen Yue Kiew (f) v Angkasamas Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO A02–271–1999
MOKHTAR SIDIN, MOHD NOOR AHMAD AND ARIFIN ZAKARIA JJCA
6 AUGUST 2003

Civil Procedure *— Appeal — Interference by appellate court — Whether appellate court should interfere — Whether existed miscarriage of justice due to non-compliance of the rules of procedure*

This is an appeal by the appellant/plaintiff against the decision of the learned judge in allowing the respondent/second defendant's counterclaim. The facts are not in contention. The appellant is the registered proprietor of land known as Lot 684, Kampung Baru, Gunung Rapat, Mukim Hulu Kinta, Perak ('the appellant's land'). The appellant's land adjoins the land referred to as HS (M) UK 5107, No PT 138041, Kampung Baharu, Gunung Rapat, Mukim Hulu Kinta, Perak ('the respondent's land') which is registered in the name of the respondent. The appellant had constructed a double storey shophouse on the appellant's land and the doors and windows and the edge of the roof protruded into the respondent's land. At the time when the approval for the construction of the shophouse was obtained from Majlis Bandaraya Ipoh ('MBI'), the first defendant in the court below, the respondent's land was yet to be alienated to the third defendant in the court below ('the respondent's predecessorin-title'). In 1997, the appellant discovered that the respondent had entered into the respondent's land to construct a double storey shophouse, and feared that remedial work may have to be carried out on the appellant's shophouse. The appellant commenced this action. The respondent filed his defence and counterclaim. The respondent applied and the appellant's action was struck out by the learned judge. The appellant appealed. The appeal is pending. The counterclaim then came up for hearing before the learned judge and an order in terms of prayers 1 and 3 was granted. The appellant appealed. The appellant stated that the learned judge arrived at his decision without affording the parties the opportunity to make submissions and asked whether the learned judge had considered correct principles in granting the orders and contended that the learned judge failed to take into account that the protrusions are *de minimis*, that the respondent had not suffered any damage or inconvenience and the appellant would incur much time, costs and inconvenience.

Held, dismissing the appeal with costs:

(1) Mere infraction of the rules of procedure does not necessarily warrant an appellate interference unless it can be shown that such non-compliance had occasioned a miscarriage of justice. The

appeal before the court was by way of rehearing, the appellant was free to make his submission before the court. On that premise the appellant had in no way been prejudiced by the mere failure of the learned judge to call upon the parties to make their submissions. Of course as a matter of prudence, judges should call upon parties to make their submissions as this would assist them a great deal in arriving at their decision (see p 369G–I).

(2) A land owner is entitled to exclusive use of his land and the air space above it and that the court would not hesitate to grant perpetual injunction against anyone trespassing into the land of another or into the air space above it. If any error had been committed by the learned judge in making the order it leaned in favour of appellant and in the circumstances therefore, no injustice had been occasioned to the appellant (see p 372B–C).

(3) The evidence of DW1 for the respondent stated that because of the protrusions, they could not build and at that they were not suffering any inconvenience or damage on the protrusions until they were allowed to build. This evidence stood unchallenged before the court. It was not exactly correct to say that the protrusions were of a trivial nature and for that reason the appellant should not be put to expense and trouble to remedy the same. In any event the appellant had not called any evidence in support of his case (see p 372G–H).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu/plantif terhadap keputusan hakim yang arif membenarkan tuntutan balas responden/defendan kedua. Fakta-fakta tidak dipertikaikan. Perayu adalah pemilik berdaftar tanah yang dikenali sebagai Lot 684, Kampung Baru, Gunung Rapat, Mukim Hulu Kinta, Perak ('tanah perayu'). Tanah perayu bersempadanan tanah yang dikenali sebagai HS (M) UK 5107, No PT 138041, Kampung Baharu, Gunung Rapat, Mukim Hulu Kinta, Perak ('tanah responden') yang didaftarkan di bawah responden. Perayu telah membina sebuah rumah kedai dua tingkat di atas tanah perayu dan pintu-pintu dan tingkap-tingkap dan tepi atap terjulur ke dalam tanah responden. Pada masa kebenaran untuk membina rumah kedai didapat daripada Majlis Bandaraya Ipoh ('MBI'), defendan pertama di dalam mahkamah di bawah, tanah responden belum diberimilik kepada defendan ketiga di dalam mahkamah di bawah ('pendulu dalam hakmilik responden'). Pada 1997, perayu telah mendapati bahawa responden telah memasuki tanah responden untuk membina rumah kedai dua tingkat, dan takut bahawa kerja-kerja pemulihan terpaksa dijalankan pada rumah kedai perayu. Perayu telah memulakan tindakan ini. Responden telah memfailkan pembelaannya dan tindakan balas. Responden telah memohon dan tindakan perayu

telah ditolak oleh hakim yang arif. Perayu telah merayu. Rayuan ini masih belum didengar. Tindakan balas kemudiannya telah didengar di hadapan hakim yang arif dan perintah seperti dipohon di dalam permohonan 1 dan 3 dibenarkan. Perayu merayu. Perayu mengatakan bahawa hakim yang arif telah membuat keputusan dengan tidak memberi peluang kepada parti-parti untuk membuat hujahan dan menanya sama ada hakim yang arif telah mempertimbangkan prinsip-prinsip yang betul di dalam memberi perintah itu dan bahawa hakim yang arif telah gagal mempertimbangkan yang bonjolan itu adalah de minimis, responden tidak mengalami apa-apa kerugian atau kesusahan dan perayu akan menanggung masa, kos dan kesusahan yang banyak.

Diputuskan, menolak rayuan dengan kos:

(1) Pelanggaran sahaja kaedah-kaedah prosedur tidak semesti mewajarkan campur tangan rayuan kecuali dapat ditunjukkan bahawa ketidakpatuhan itu telah menyebabkan salah laksana keadilan. Rayuan di hadapan mahkamah adalah melalui pendengaran semula, perayu bebas membuat hujahan beliau di hadapan mahkamah. Pada premis itu, perayu tiadk diprejudiskan oleh kegagalan hakim yang arif meminta parti-parti membuat hujahan-hujahan mereka. Walau bagaimanapun, untuk cermat, hakim-hakim patut meminta parti-parti membuat hujahan-hujahan mereka kerana ini akan menolong hakim di dalam membuat keputusan (lihat ms 369G–I).

(2) Pemilik tanah berhak kepada penggunaan ekslusif tanah beliau dan ruang udara di atasnya dan mahkamah akan membenarkan injunksi kekal terhadap orang yang menceroboh ke dalam tanah orang lain atau ruang udara di atasnya. Jikalau terdapat kekhilafan oleh hakim yang arif di dalam membuat perintah ia adalah menyebelahi perayu dan di dalam keadaan ini tiada ketidakadilan dilakukan kepada perayu (lihat ms 372B–C).

(3) Keterangan DW1 untuk responden menyatakan bahawa oleh kerana bonjolan itu, mereka tidak dapat membina dan mereka tidak disusahkan atau mengalami kerugian kerana bonjolan itu hingga mereka dibenarkan membina. Keterangan ini tidak dicabar di hadapan mahkamah. Ia tidak tepat untuk menyatakan bahawa bonjolan itu adalah kecil dan oleh itu perayu tidak patut menggunakan wang dan susah untuk memulihkan yang sama. Walau bagaimanapun perayu tidak ada keterangan untuk menyokong kes beliau (lihat ms 372G–H).]

Notes

For case on the interference of appellate courts, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 854–867.

Cases referred to

Mellstrom v Garner & Ors [1970] 2 All ER 9 (distd)
Karuppannan v Balakrishnen (Chong Lee Chin & Ors, third parties) [1994] 3 MLJ 584 (refd)
Ng Yee Fong & Anor v EW Talalla [1986] 1 MLJ 25 (refd)
Vasudevan v T Damodaran & Anor [1981] 2 MLJ 150 (refd)

Legislation referred to

National Land Code s 44(l)(a)
Rules of the High Court 1980 O 35 r 4
Specific Relief Act 1950 s 41

Appeal from: Guaman Sivil No. 22–87–1997 (Mahkamah Tinggi, Ipoh)

Norazali bin Nordin (*Chee & Associate*) for the appellant.
Lee Pooi Mun (*Khong & Son*) for the respondent.

Arifin Zakaria JCA (delivering judgment of the court):

Background facts

This is an appeal by the appellant/plaintiff against the decision of the learned judge in allowing the respondent/second defendant's counterclaim. The facts leading to the counterclaim are not in contention and may briefly be stated as follows. The appellant is the registered proprietor of land known as Lot 684, Kampung Baru, Gunung Rapat, Mukim Hulu Kinta, Perak ('the appellant's land'). The appellant's land adjoins the land referred to as HS (M) UK 5107, No PT 138041, Kampung Baharu, Gunung Rapat, Mukim Hulu Kinta, Perak ('the respondent's land'), which is presently registered in the name of the respondent. The appellant had constructed a double storey shophouse on the appellant's land. It is conceded that the doors and windows and the edge of the roof of the said shophouse on the appellant's land protruded into the respondent's land. It is also not in dispute that at the time when the approval for the construction of the shophouse was obtained from the Majlis Bandaraya Ipoh ('MBI'), the first defendant in the court below, the respondent's land is yet to be alienated to the third defendant in the court below ('the respondent's predecessor-in-title'). Sometime around June 1997, the appellant discovered that the respondent had entered into the respondent's land with the intention of constructing a double storey shop house thereon. The appellant feared that the said construction work may result in the appellant having to carry out remedial work to his shophouse because of the profusions adverted to earlier. The appellant then commenced this action. The respondent then filed his defence and counterclaim. On the respondent's application the

appellant's action was struck out by the learned judge on 3 April 1998. The appellant appealed against the said order. The appeal is currently pending before this court.

On 1 March 1999, the counterclaim came up for hearing before the learned judge and an order in terms of prayers 1 and 3 of the counterclaim (with modifications) was granted by the learned judge. The appellant is dissatisfied with the said order and hence this appeal. On 10 February 2003 this appeal came up for hearing before us and after having heard submissions of both parties we dismissed the appeal with costs. We now give our reasons.

The grounds of appeal

Three principal grounds were advanced by the appellant in support of this appeal. We will consider each of the these grounds in the order they were raised before us. The first complaint by the appellant was that the learned judge arrived at his decision without affording the parties the opportunity to make their submissions. The notes of proceedings before the learned judge with regard to the counterclaim by the respondent reveals that only one witness was called to give evidence on behalf of the respondent. The appellant did not call any witness. At the close of the appellant's case, the learned judge then made the following orders:

Prayer 1: OIT

Prayer 2: Plaintiff to remove all structures encroaching into the second defendant's land if the Majlis Bandaraya approves the building plan for the second defendant to build on the land.

From the note of proceedings, it is true that at the close of the appellant's case, the learned judge did not call the respective parties to make their submissions. The learned counsel for the appellant contended that this constitutes a serious breach of the rules of procedure as contained in O 35 r 4 of the Rules of the High Court 1980 ('the RHC') (which relates to the order of speeches at the trial).

Having considered the arguments of both counsel for the appellant and the respondent, we are in agreement with the submission of the learned counsel for the respondent that mere infraction of the rules of procedure does not necessarily warrant an appellate interference unless it can be shown that such non-compliance had occasioned a miscarriage of justice. We would stress that an appeal before us is by way of rehearing, the appellant is, therefore, free to make his submission before us. On that premise, we are of the view that the appellant had in no way been prejudiced by the mere failure of the learned judge to call upon the parties to make their submissions. Of course as a matter of prudence, judges should call upon parties to make their submissions as this would assist them a great deal in arriving at their decision.

For the above reasons, we would dismiss the first ground advanced by the appellant. We now turn to consider the principal issue in this appeal, that is, whether the learned judge had acted on correct principles in granting the orders which are now under appeal. In the counterclaim, the respondent sought a number of declaratory reliefs against the appellant. The power of the court to grant declaratory relief is governed by s 41 of the Specific Relief Act 1950. It is a discretionary power. It is not an unfettered discretion. It must be based on correct principles. It is subject to review by the appellate court. However, this power of review by the appellate court is highly circumscribed. This is well stated in the following passage of the judgment of Abdoolcader J (as he then was) in *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150 at p 151:

> There is a catenation of cases on this point and it will suffice to cull and refer to a few which restate the well-settled principles. An appellate court can review questions of discretion if it is clearly satisfied that the judge was wrong but there is a presumption that the judge has rightly exercised his discretion and the appellate court must not reverse the judge's decision on a mere 'measuring cast' or on a bare balance as the mere idea of discretion involves room for choice and for differences of opinion (*Charles Osenon & Co v Johnston* [1942] AC 130 (at p 148 per Lord Wright). The Privy Council held in *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228, that an appellate court will not interfere with the discretion exercised by a lower court unless it is clearly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice, referring to *Evans v Bartlam* [1937] AC 473.

The complaint by the appellant in this present case is that the learned judge failed to take into consideration, in the exercise of his discretion, that the relief sought for by the respondent does not serve any useful purpose as it concerns the right of the respondent to build on his land in accordance with a plan which is yet to be approved by MBI. In support, the learned counsel relied upon the English case of *Mellstrom v Garner & Ors* [1970] 2 All ER 9. With respect, after considering the facts and the declaration sought for in that case we are of the view it is not all applicable to the present case. In the present case the claim by the respondent is premised on trespass simpliciter by the appellant on the respondent's land or the air space above it and that alone in our view is sufficient ground for the respondent to maintain an action for trespass against the appellant. For support we would refer to the decision of the Federal Court in *Ng Yee Fong & Anor v EW Talalla* [1986] 1 MLJ 25, where Mohamed Azmi SCJ in delivering the judgement of the court stated thus at pp 25-26:

> As a matter of law, it cannot be disputed that a proprietor who establishes a proprietary right is *ex debito justitiae* entitled to an injunction unless it can be said against him that he has raised such an equity that it is no longer open to him to assert his legal or proprietary title. Further as stated at p 30 in *Kerr on Injunction* (6th Ed):

> 'After the establishment of his legal right and of the fact of its violation, a plaintiff is in general entitled as of course to a perpetual injunction to prevent the recurrence of the wrong unless there be something special in the circumstances of the case, such as laches or where the interference with the plaintiff's right is trivial.'

The onus is therefore on the appellants to establish that there is something special in the circumstances of the present case why the learned trial judge ought not to have granted the injunction in favour of the respondent.

In the present case it is not disputed that the respondent is the registered owner of the respondent's land and as such the respondent is entitled to all such rights as defined in s 44(l)(a) of the National Land Code which provides as follows:

> Subject to the provisions of this Act and of any other written law for the time being in force, any person or body to whom (under this Act or a previous land law) land has been alienated, reserved land has been leased or temporary occupation licence (including a licence so styled under a previous land law) has been granted in respect of any land, shall be entitled to:
>
> (a) the exclusive use and enjoyment of so much of the column of airspace above the surface of the land, and so much of the land below that surface, as is reasonably necessary to the lawful use and enjoyment of the land;

The protrusions into the respondent's land by the appellant may look trivial in the eyes of the appellant; nevertheless it could not be denied that they constitute a clear breach of the respondent's right to the exclusive use and enjoyment of his land. In *Karuppannan v, Balakrishnen (Chong Lee Chin & Ors, third parties)* [1994] 3 MLJ 584 at p 584, the Federal Court was faced with a somewhat similar issue. There the appellant's predecessor-in-title had applied for permission to build side windows protruding into Lot 25 for aesthetic value and undertook to remove them so they would not obstruct the construction of any building on Lot 25 which was then still vacant. Her application was approved on condition that the protrusion had to be removed the moment the registered owner of Lot 25 intended to build on it. The respondent asked the appellant to remove the protrusion and the appellant refused to comply. The respondent also alleged trespass against the appellant for constructing side exit, sewerage system, manholes and septic tank. The respondent's application for an interlocutory mandatory injunction was granted by the High Court and on appeal, the Federal Court affirmed the decision of the High Court. The Federal Court in its judgment stated in that in the circumstances of that case an interlocutory mandatory injunction was appropriate and necessary remedy eventhough it gave the whole remedy asked for in the action. At p 593 it observed as follows:

> As we have said, in the case of a trespass to land and airspace committed by the owner of an adjacent lot as serious as in this case, the aggrieved owner of the lot upon which trespass is committed is entitled to an interlocutory man-

> datory injunction by which to have the source of the trespass removed notwithstanding that the source of the trespass had already been in existence before the new owner came to own the land and whether or not he knew or had notice of it.

What we can draw from the above cited authority is that a land owner is entitled to exclusive use of his land and the air space above it and that the court would not hesitate to grant perpetual injunction against anyone trespassing into the land of another or into the air space above it. The mere fact that the respondent is not asking for the immediate removal of the objects protruding into his land, not until the approval of the respondent's building plan by MBI, could not in our view be a cause for complaint. In our view if any error had been committed by the learned judge in making such an order we think it leans in favour of appellant and in the circumstances therefore, we see no injustice having been occasioned to the appellant.

The appellant further contended that the learned judge erred in arriving at his decision by failing to take into consideration the following factors namely:

(i)the protrusions are *de minis* in nature;

(ii)the respondent has suffered no damage or inconvenience; and

(iii)the respondent will enjoy only a limited benefit from the removal of the protrusions whilst the appellant would incur much time, cost and inconvenience.

As against that contention we have the evidence of DW1 for the respondent which clearly stated that:

> Because of the protrusions we cannot build. At the moment we do not suffer any inconvenience on the protrusions. No direct damage to us until we are allowed to build.

This evidence of DW1 stands unchallenged before the court. Therefore it is not exactly correct to say that the protrusions are of a trivial nature and for that reason the appellant should not be put to expense and trouble to remedy the same. In any event the appellant had not called any evidence in support of his case. For the above reasons we find that this final ground of appeal advanced by the appellant must also fail.

The result

For the reasons given above we find no apparent flaw in the decision of the learned judge and we, therefore, dismissed the appeal herein with costs. We further ordered that the deposit be paid to the respondent towards account of taxed costs.

A *Appeal dismissed with costs.*

Reported by Chew Phye Ken

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